To be Argued by:
BETH ANN KASWAN

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New York Supreme Court

Appellate Division—First Department

In the Matter of the Application of

THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures), *et al.*,

Petitioners,

(For Continuation of Caption See Inside Cover)

REPLY BRIEF FOR RESPONDENTS-RESPONDENTS-CROSS-APPELLANTS THE RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY & BENEFIT FUND OF THE CITY OF CHICAGO AND OTHER MEMBERS OF THE PUBLIC PENSION FUND COMMITTEE, CITY OF GRAND RAPIDS GENERAL RETIREMENT SYSTEM, CITY OF GRAND RAPIDS POLICE AND FIRE RETIREMENT SYSTEM AND THE WESTMORELAND COUNTY EMPLOYEE RETIREMENT SYSTEM

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For an order, pursuant to C.P.L.R. § 7701, seeking judicial instructions and approval of a proposed settlement.

THE BANK OF NEW YORK MELLON, (as Trustee under various Pooling and Servicing Agreements and Indenture Trustee under various Indentures),

Petitioner-Appellant-Cross-Respondent,

– and –

BLACKROCK FINANCIAL MANAGEMENT INC., KORE ADVISORS, L.P., MAIDEN LANE, LLC, METROPOLITAN LIFE INSURANCE COMPANY, TRUST COMPANY OF THE WEST and affiliated companies controlled by The TCW Group, Inc., NEUBERGER BERMAN EUROPE LIMITED, PACIFIC INVESTMENT MANAGEMENT COMPANY LLC, GOLDMAN SACHS ASSET MANAGEMENT, L.P., TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA, INVESCO ADVISORS, INC., THRIVENT FINANCIAL FOR LUTHERANS, LANDESBANK BADEN-WUERTTEMBERG, LBBW ASSET MANAGEMENT (IRELAND) PLC, DUBLIN, ING BANK FSB, ING CAPITAL LLC, ING INVESTMENT MANAGEMENT LLC, NATIONWIDE MUTUAL INSURANCE COMPANY and its affiliated companies, AEGON USA INVESTMENT MANAGEMENT LLC, authorized signatory for Transamerica Life Insurance Company, AEGON FINANCIAL ASSURANCE IRELAND LIMITED, TRANSAMERICA LIFE INTERNATIONAL (BERMUDA) LTD., MONUMENTAL LIFE INSURANCE COMPANY, TRANSAMERICA ADVISORS LIFE INSURANCE COMPANY, AEGON GLOBAL INSTITUTIONAL MARKETS, PLC, LIICA RE II, INC., PINE FALLS RE, INC., TRANSAMERICA FINANCIAL LIFE INSURANCE COMPANY, STONEBRIDGE LIFE INSURANCE COMPANY, WESTERN RESERVE LIFE ASSURANCE CO. OF OHIO, FEDERAL HOME LOAN BANK OF ATLANTA, BAYERISCHE LANDESBANK, PRUDENTIAL INVESTMENT MANAGEMENT, INC., and WESTERN ASSET MANAGEMENT COMPANY,

Intervenors-Petitioners-Appellants-Cross-Respondents,

– against –

THE RETIREMENT BOARD OF THE POLICEMEN'S ANNUITY AND BENEFIT FUND OF THE CITY OF CHICAGO, CITY OF GRAND RAPIDS GENERAL RETIREMENT SYSTEM, CITY OF GRAND RAPIDS POLICE AND FIRE RETIREMENT SYSTEM, THE WESTMORELAND COUNTY EMPLOYEE RETIREMENT SYSTEM, TRIAXX PRIME CDO 2006-1, LTD., TRIAXX PRIME CDO 2006-2, LTD., TRIAXX PRIME CDO 2007-1, AMERICAN INTERNATIONAL GROUP, INC., AMERICAN GENERAL ASSURANCE COMPANY, AMERICAN GENERAL LIFE AND ACCIDENT INSURANCE COMPANY, AMERICAN GENERAL LIFE INSURANCE COMPANY, AMERICAN GENERAL LIFE INSURANCE COMPANY OF DELAWARE, AMERICAN HOME ASSURANCE COMPANY, AMERICAN INTERNATIONAL LIFE ASSURANCE COMPANY OF NEW YORK, CHARTIS PROPERTY CASUALTY COMPANY, CHARTIS SELECT INSURANCE COMPANY, COMMERCE AND INDUSTRY INSURANCE COMPANY, FIRST SUNAMERICA LIFE INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY, NATIONAL UNION FIRE

INSURANCE COMPANY OF PITTSBURGH, PA, NEW HAMPSHIRE INSURANCE COMPANY, SUNAMERICA ANNUITY AND LIFE ASSURANCE COMPANY, SUNAMERICA LIFE INSURANCE COMPANY, THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, THE UNITED STATES LIFE INSURANCE COMPANY IN THE CITY OF NEW YORK, THE VARIABLE ANNUITY LIFE INSURANCE COMPANY, WESTERN NATIONAL LIFE INSURANCE, UNITED STATES DEBT RECOVERY VIII, LP, UNITED STATES DEBT RECOVERY X, LP and AMERICAN FIDELITY ASSURANCE COMPANY,

Respondents-Respondents-Cross-Appellants,

– and –

STERLING FEDERAL BANK, F.S.B., BANKERS INSURANCE COMPANY, BANKERS LIFE INSURANCE COMPANY, FIRST COMMUNITY INSURANCE COMPANY, BANKERS SPECIALTY INSURANCE COMPANY, FEDERAL HOME LOAN OF PITTSBURGH, AMICI ASSOCIATES, LP, AMICI FUND INTERNATIONAL LTD., AMICI QUALIFIED ASSOCIATES, CEDAR HILL CAPITAL PARTNERS LLC, CEDAR HILL MORTGAGE FUND GP LLC, CEDAR HILL MORTGAGE OPPORTUNITY MASTER FUND LLP, DECLARATION MANAGEMENT & RESEARCH LLC, DOUBLELINE CAPITAL LP, FIRST BANK, FIRST FINANCIAL OF MARYLAND FEDERAL CREDIT UNION, FIRST NATIONAL BANK & TRUST CO. OF ROCHELLE, ILLINOIS, FIRST NATIONAL BANKING COMPANY, FIRST PENN-PACIFIC LIFE INSURANCE COMPANY, KERNDT BROTHERS SAVINGS BANK, LEA COUNTY STATE BANK, LINCOLN LIFE & ANNUITY COMPANY OF NEW YORK, LINCOLN NATIONAL REINSURANCE COMPANY (BARBADOS) LIMITED, LL FUNDS LLC, MANICHAEAN CAPITAL, LLC, NEXBANK, SSB, PEOPLES INDEPENDENT BANK, RADIAN ASSET ASSURANCE INC., THE COLLECTORS' FUND LP, THE LINCOLN NATIONAL LIFE INSURANCE COMPANY, THOMASTON SAVINGS BANK, VALLEY NATIONAL BANK, MORTGAGE BOND PORTFOLIO LLC, FIRST RELIANCE STANDARD LIFE INSURANCE COMPANY, LIBERTY VIEW, PLATINUM UNDERWRITERS BERMUDA, LTD., PLATINUM UNDERWRITERS REINSURANCE, INC., RELIANCE STANDARD LIFE INSURANCE COMPANY, SAFETY NATIONAL CASUALTY CORPORATION, SUN LIFE INSURANCE COMPANY OF CANADA, CA CORE FIXED INCOME FUND, LLC, CA CORE FIXED INCOME FUND, LTD., CA HIGH YIELD FUND, LLC, CA HIGH YIELD FUND, LTD., STRATEGIC EQUITY FUND, LLC, STRATEGIC EQUITY FUND, LTD., SAND SPRING CAPITAL III MASTER FUND, LLC, CIFG ASSURANCE NORTH AMERICA, INC., BANKERS TRUST COMPANY, PINE RIVER FIXED INCOME MASTER FUND LTD., PINE RIVER MASTER FUND LTD, SILVER SANDS FUND LLC, TWO HARBORS ASSET I LLC, GOOD HILL PARTNERS LP, and BALLANTYNE RE PLACE,

Respondents-Respondents,

– and –

THE KNIGHTS OF COLUMBUS,

Intervenor-Respondent-Respondent.

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Respondents-Appellees-Cross-Appellants, the Retirement Board of the Policemen's Annuity & Benefit Fund of the City of Chicago, the City of Grand Rapids General Retirement System and the City of Grand Rapids Police and Fire Retirement System (collectively, the "Public Funds"), file this Reply in support of their request that this Court reverse the Decision and Judgment of the Article 77 Court to the extent it purported to approve any aspect of the $8.5 billion Proposed Settlement or adopted certain of BNYM's[1] proposed findings (which it had submitted as part of BNYM's Proposed Final Order and Judgment ("PFOJ") (*see* JRA68a-80a, 120a).[2]

I. PRELIMINARY STATEMENT

This case presents enormously important questions as to when the courts of this state should give their judicial blessing to a trustee's conduct in agreeing to a proposed settlement -- with its attendant *res judicata* implications for the trusts' beneficiaries -- in circumstances where the extensive factual record plainly shows that the trustee was not merely a manifestly reluctant "champion" of its beneficiaries' cause, but also shows how time after time the trustee engaged in

[1] This brief uses the same defined terms as the Public Funds' Opening Brief ("PB") of July 17, 2014.

[2] The PFOJ included a "release" of potential claims by both the MBS Trusts at issue here and by the Trusts' current and former investors -- including those who have not been joined as parties to this proceeding. Former certificateholders who have sold their MBS holdings would receive no consideration for the release. The PFOJ also sought an injunction in favor of BNYM that would bar certificateholders from prosecuting claims related to this Settlement.

unreasonable conduct that is simply inexplicable for a trustee that was genuinely seeking to maximize the trusts' recovery for the benefit of certificateholders.

In BNYM's Reply Brief ("BNYMRB"), BNYM once again attempts to justify its conduct and the Proposed Settlement on the grounds that $8.5 billion is a large sum, and that Countrywide (though not BOA) was unable to pay more. However, the harm that Countrywide and BOA caused to the certificateholders in the more than 530 MBS Trusts at issue, which held over one million loans, is unprecedented, so that it is hardly surprising that the proposed settlement would be *at least* $8.5 billion (which itself represents only about 10% of investor losses as calculated by BNYM's own damages expert (JRA2834-35) (Burnaman). Nor does the record show that BNYM could not have recovered more, as BOA itself had estimated the "upper" range of its exposure for private repurchase claims at $7-$10 billion (JRA6368-6370, PTX26) (so that the $8.5 billion settlement number was merely the midpoint of that range).[3] Moreover, as discussed below, BOA's settlement range included a multi-*billion* dollar built-in discount to reflect the fact

[3] The $7-$10 billion was BOA's contingency disclosure for its consolidated potential repurchase liability for "private label" (as opposed to Government Sponsored Entity ("GSE")) securitizations, which was disclosed in its SEC filings. The unpaid balance for Countrywide loans (which backed the 530 Trusts at issue here) constituted 78.8% of the total loans for which this potential liability was calculated. *See* PB25 n.9.

that BNYM and its counsel were unwilling to commit to sue if a settlement was not reached.[4]

The question for this Court is therefore not whether $8.5 billion is a large number, but whether BNYM has met *its* burden of establishing that the Proposed Settlement is substantively fair and reasonable, and *its* burden of showing its purported entitlement to judicial findings that it acted reasonably in negotiating and entering into that settlement. *See, e.g.*, JRA71-72a & 80a at ¶¶(h-k) & (t); JRA120a. BNYM urges that its conduct was reasonable in all respects because it "vigorously" participated in all significant negotiations, aided by zealous counsel and multiple experts, and accuses Objectors of presenting facts that bearing "no resemblance to the trial evidence." BNYMRB2. When it comes to candidly describing the key facts, however, it is BNYM that distorts and/or ignores the record.

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[4] The Court can also take judicial notice of BOA's most recent SEC filings, in which it announced a further $17 billion deal to pay off claims against it brought by the Department of Justice arising out of Countrywide's rampant misconduct in the underwriting and securitization of mortgage loans. *See* BOA, (SEC Form 8-K), (dated Aug. 21, 2014) (available at www.sec.gov). Indeed, in settling the Government's *qui tam* action for Countrywide's "Hustle" RMBS program, as described in the decision approving the settlement reported at *U.S. ex. rel. O'Donnell v. Country Wide Home Loans, Inc.*, 12 CV 1422 (JSR), 2014 WL 3734122 (S.D.N.Y. July 30, 2014), BOA did not even contest its successor-in-interest liability in that matter. *Id.* at *6 n.4. Accordingly, Countrywide's lack of assets has hardly been a determinative factor when BOA has been aggressively pushed in litigation or negotiations. *See also* PB29 (citing evidence from the Record (as opposed to BNYM's cite to a news article) regarding MBIA's ten figure settlement against BOA in connection with MBIA losses it suffered on just a *handful* of Countrywide MBS Trusts – a settlement that was reached after MBIA had actually litigated BOA's successor liability for Countrywide and *after* the N.Y. Supreme Court had *denied* BOA's motion for summary judgment on that issue (citing *MBIA Insurance Corp. v. Countrywide Home Loans, Inc.*, 965 N.Y.S.2d 284, 290-91 (N.Y. Sup. Ct. 2013)).

Simply stated, neither BNYM nor its counsel aggressively pursued negotiations, but rather pursued a "strategy" of having the Institutional Investors -- who met the 25% "Presentment Threshold" ownership stake sufficient to overcome the relevant "no-action" clauses with respect to no more than 189 of the 530 Trusts at issue -- negotiate the settlement's monetary price on their own. However, BNYM took no steps to exercise its powers to obtain even a sample of mortgage loan files from BOA that were needed to show just how horrendous the mortgage loans in the Trusts were (thereby facilitating BOA's efforts to focus damages on analyses pegged off of inapposite and misleading "GSE data" from Freddie Mac and Fannie Mae). Similarly, BNYM never sought to obtain any internal Countrywide or BOA documents to rebut BOA's arguments that it was not liable for Countrywide's debts – and only after the settlement was inked did BNYM hire experts (for the purpose of presenting the case's "weaknesses" to the Article 77 Court and potential objectors), who then actually opined only that BOA's liability as Countrywide's successor would turn on evidence that only BOA had access to (and which BNYM never demanded). Instead, BNYM effectively left the Institutional Investors, who were unable to obtain mortgage origination files or other BOA internal records on their own, to fend for themselves in price negotiations.

BNYM's most significant failing, however, was its role in *affirmatively undercutting* the Institutional Investors' bargaining power during negotiations by refusing to say whether, absent an agreement with BOA, it would be willing to sue on behalf of the 341 Trusts (or roughly two-thirds of all Trusts) as to which there was no investor group (including the Institutional Investors) with the 25% "presentment" ownership interest needed to be able to direct BNYM to sue on behalf of those Trusts. As a result, to arrive at its $7-$10 billion "upper range" of potential repurchase liability, BOA discounted its settlement positions by 20% during negotiations -- and even publicly reported that it had discounted its litigation contingency exposure for private-label MBS trusts (including those here) by *billions* of dollars due to the "presentment" obstacles faced by those trusts).

Apparently realizing that it has no reasonable explanation for its failure to even *threaten* to sue on behalf of 341 of the 530 Trusts at issue, BNYM blatantly distorts the record and attempts to mislead the Court by asserting that it was "perfectly clear" that BNYM would sue if a settlement were not reached. BNYMRB45. The Institutional Investors' Reply Brief ("IIRB") similarly feigns "astonishment" at the notion that BNYM "refused to give any assurance that it would sue if the Proposed Settlement blew up." IIRB17. As BNYM and the Institutional Investors well know, however, the point is not whether litigation might follow with respect to the no more than 189 Trusts where the Institutional

Investors had the requisite 25% holdings to direct litigation, but that BNYM's undeniable refusal to even threaten to sue *with respect to the remaining 341 Trusts* left the Institutional Investors with one hand tied behind their backs in negotiations. BNYM's and the Institutional Investors' arguments are all the more disingenuous on this point given that their initial October 2011 briefs below both emphasized that potential objectors (and the Article 77 Court) should not criticize the Proposed Settlement because, for the 341 of 530 Trusts for which the Institutional Investors lacked a 25% stake, *there was "no litigation alternative*." JRA11730-31 (RTX132-008-009); JRA11721 (RTX131-038).[5]

Nor can BNYM dispute that it has consistently *denied* owing full-fledged fiduciary duties to all absent certificateholders, or that it failed to retain *anyone* to represent their interests. It is similarly uncontested that the counsel that BNYM relied upon (Mayer Brown) agreed that it was retained *only* to represent BNYM. Yet even that retention was on its face unreasonable, as BNYM – out of all the law firms in New York – found it most convenient to retain and rely upon a conflicted law firm, without the absent certificateholders' knowledge or consent, that was also simultaneously representing the Trusts' main adversary, BOA, in other

[5] BNYM's and the Institutional Investors' "no litigation alternative" message for investors in those Trusts -- which constituted a none-too-subtle "take it or nothing" threat -- doubtless explains why many investors did not go to the time and expense of filing objections to the proposed deal. In addition, as discussed in §III.C, the dimunition in the number of objectors since the appeals were filed in this Court appears to be explained by a different factor: namely, BofA's willingness to buy them off in separate settlements.

matters. However, the confluence of a passive if not anti-productive Trustee (which still denies having full-fledged fiduciary duties to any certificateholders) and a law firm loyal only to BNYM (and BOA) may at least help this Court understand why the entire settlement process here did not occur in a reasonable or remotely usual way: *i.e.*, by first hiring *unconflicted* and zealous counsel, pushing to obtain documents and facts to build a strong case for a maximum recovery *before* entering price negotiations (rather than relying on the adversary's cherry-picked facts and assumptions), and retaining merits and damages experts for the purpose of increasing their beneficiaries' leverage and recovery at the bargaining table, rather than hiring them only *after* others had negotiated the settlement price.

In sum, BNYM proceeded in this matter from the baseless conceit that, as the "owner" of the repurchase rights, it had the sole "power" to act on behalf of the 341 Trusts as to which the "25% Presentment Level" was lacking, but it could arbitrarily exercise its discretion to refuse to do so -- and that even when BNYM *did* choose to act, it was free of fiduciary "prudent person" duties to act diligently and single-mindedly to maximize the Trusts' recovery. *Compare, e.g.*, PSA §2.06, JRA6466-6467 (PTX71.63-64) (conveying powers to Trustee "for the benefit of all present and future Holders of the Certificates … to the end that the interests of the Holders of the Certificates may be adequately and effectively protected"). BNYM's acts and omissions here failed both the high standards of fiduciary duty

and of ordinary reasonableness, and actually undermined in vital respects the Institutional Investors' (and all certificateholders') bargaining position. Accordingly, BNYM is *not* entitled to any judicial findings that "approve" the settlement, let alone any judicial findings that it acted reasonably and in good faith.

II. SETTING THE RECORD STRAIGHT

As a threshold matter, both BNYM and the Institutional Investors' briefs rely on factual assertions that are simply not true, or are at best artful half-truths. Objectors set the record straight below.

A. BNYM Failed to Even Threaten to Sue on Behalf of the 341 (Out of 530) Trusts Where the 25% Presentment Level Was Not Met

BNYM argues that "it was 'very clear' that BofA would face aggressive litigation if it rejected [the $8.5 billion] final offer," BNYMRB12, and the Institutional Investors similarly deny that BNYM "refused to give any assurance that it would sue if the Proposed Settlement blew up." IIRB17. In fact, as confirmed by both the Institutional Investors' and BNYM's own briefs, as well as the testimony of every knowledgeable witness that took the stand, BNYM never even *threatened* to sue on behalf of roughly two-thirds (341 out of 530) of the Trusts at issue. *See* PB23-25.

For example, it cannot be disputed that, in explaining why they believed the $8.5 billion sum they had negotiated was "highly beneficial," the Institutional

Investors' October 2011 brief repeatedly emphasized that there was *no litigation alternative for the 341 Trusts* where the Institutional Investors lacked the 25% ownership interest to force BNYM to sue. In other words, although BNYM was prepared (at least where it had obtained certain indemnifications) to lend its "standing" for the benefit of all 530 Trusts if BOA voluntarily agreed to settle,[6] BNYM was *not* willing to even threaten litigation with respect to the 341 Trusts where the Institutional Investors lacked the ability to force BNYM's hand. Among the many statements in the Institutional Investors' October 2011 brief that makes this clear are the following:

(a) The Settlement is "highly beneficial," because there is "*no litigation alternative for 341 trusts at issue in the settlement so they will get nothing if the settlement is not approved.*" (JRA11730-31)[7] (RTX132-008-009);

(b) "Under the PSAs, the contract claims resolved in the settlement belong to the Trustee. . . . The Trustee has the power to pursue the claims . . . but it is not required to investigate them. . . . *These provisions significantly limit the litigation options. . .*" (JRA11732-33, ¶1) (RTX132-010-011);

(c) "The circumstances in which Certificateholders can pursue these claims are also very narrow**.** *The PSAs require Certificateholders to aggregate 25% of the Voting Rights. . . . Only then can Certificateholders file suit.*" (JRA11733, ¶2) (RTX132-011);

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[6] As discussed in Objectors' opening brief, BNYM obtained an indemnity from BOA for agreeing not to seek to declare an event of default; *see* PB18-20

[7] All emphases to document, testimony, or case law citations herein are added unless otherwise noted.

(d) "There are 341 other Trusts involved in the settlement. In all but two of those 341 Trusts, no group alleges that they hold 25% of the Voting Rights. *In fact, of the $40 billion in securities held by the Institutional Investors or by the funds and clients they advise, almost $14 billion are in Trusts where the Institutional Investors lack the required 25% threshold. If the settlement is disapproved, these Trusts will receive no remedy at all."* (JRA11735, ¶5) (RTX132-013).

(e) "[The PSAs'] 'no action' clauses have been vigorously enforced by the courts . . . These clauses 'prevent[] individual bondholders from pursuing an individual course of action.'" (legal citations omitted) (JRA11738-39, ¶13) (RTX132-018).

(f) "As a practical matter, no-action provisions *preclude* Certificateholders from pursuing claims on behalf of the Trustee . . . *This important limitation must be considered when the Court assesses whether a litigated alternative is even available for most of the Trusts."* (JRA11740, ¶14) (RTX132-018).

See also JRA11761-65, ¶¶53-58 (RTX132-039-043) (section of Institutional Investors' October 2011 brief entitled "What are the Alternatives to Settlement?").

Similarly, *BNYM's* October 2011 brief boldly avers that "*None* of the objectors suggest *any possible route* by which investors in the Trusts could obtain any benefit or remedy through a vehicle other than a Settlement – *be it litigation or otherwise,*" and then proceeds to cite cases dismissing certificateholder cases under the applicable "no-action" clauses. JRA11695 (RTX131-012); *See also* JRA11721 (RTX131-038) ("For the *many* investors whose holdings are too small to instruct the Trustee . . . *the alternative is the status quo*".).

The testimony of numerous witnesses below paints the same picture. For example, Prof. Fischel, *BNYM's* expert, agreed that one of the reasons to support the Proposed Settlement was that, for the two-thirds of Trusts where the Institutional Investors did not own a 25% stake, there was *no* indication that BNYM would sue:

> Q. And so the point that you're making is that even though the institutional investors have $40 billion of investments, they don't have the capability of protecting the $14 billion [of their holdings] that are in trusts in which they do not control 25 percent of the voting interest; is that right?
>
> A. (by Prof. Fischel). … [A]s I was explaining before lunch, the rights of the certificate holders relative to the trustee are contractual in nature and the rights of 25 percent holders in terms of their ability to direct the trustee to file a suit are different from the rights of certificate holders with less than 25 percent. *So the point that I was making, as I stated, is that absent the direction by the 25 percent holders, what would happen is completely unknown.*
>
> Q. And when you say 'what would happen', one of the unknowns is whether the trustee would step in and exercise its powers under the governing agreement to sue on behalf of those trusts?
>
> A. Correct. *That is an unknown as of the time – as of this time and I think [as of] the time of the proposed settlement as well.*

JRA3729:6-26 (Fischel).

Nor, as BNYM well knows, was there anything in the testimony of Mssrs. Laughlin, Bailey, or McCarthy (which it cites for the proposition that litigation would have "clearly" ensued if settlement negotiations broke down; BNYMRB12-13, 45) that shows that Mayer Brown or BNYM ever told anyone during the course

of settlement negotiations that BNYM would sue with respect to any of the 341 Trusts where the Institutional Investors lacked the power to force BNYM to do so. Instead, BOA's negotiator, Mr. Laughlin, testified that he had "no recollection" of BNYM ever stating it would sue on behalf of the Trusts where the Institutional Investors did not have 25%, even though he unpersuasively[8] suggested that he "didn't get any of those technicalities [and] didn't have that level of understanding at that point." JRA816:3-9 (Laughlin).

As for BNYM in-house counsel Robert Bailey – whose testimony the Article 77 Court cited in finding that the Trustee was purportedly "prepared for litigation" (JRA94a)– Mr. Bailey actually confirmed that he *never* told BOA that BNYM would sue BOA if there was no settlement agreement, and that he did not know if anyone else from BNYM conveyed that message to BOA. JRA2465:16-20 (Bailey). He also testified, at his deposition, that he did not authorize anyone to convey that message (JRA2466:6-8) (Bailey), and further testified at trial that he would have been among those to pass on that message to Mayer Brown had there been any such directive. JRA2466:13-17 (Bailey). BNYM's Bailey also testified that he knew that BOA was applying a sizable "litigation discount" (*i.e.*, a discount for the claims of Trusts for which there were no investor groups holding 25%) to

[8] *Compare, e.g.,* BOA's own SEC filings and BOA-prepared negotiating materials that detailed how BOA had significantly discounted its liability exposure due precisely to 25% holding "presentment" issues, discussed below at §II.B at 16.

its settlement positions. JRA2467:17-22 (Bailey). However, although Bailey testified that it was "implied" that litigation was an option, he also took the position that BNYM's legal department was *never authorized* by BNYM management to use BNYM's power to pursue litigation for the Trusts where the Institutional Investors lacked a 25% interest. JRA2468:16-2469:10 (Bailey). And perhaps most significantly, when specifically asked whether it was his testimony that BOA understood that BNYM was prepared to sue on behalf of those trusts where the Institutional Investor group did not have 25%, Bailey testified "*I have no idea what [BOA] may have thought or not.*" JRA2469:23-2470:3 (Bailey).

Similarly, Kevin McCarthy, the BNYM in-house attorney that Mayer Brown described as BNYM's "apex" official, JRA4336:24-4337:8, testified that he had no recollection of discussing potential litigation with BOA or the Institutional Investors, while adding that he had "no doubt in [his] mind that [BOA] understood that we could necessarily be in a position to *have to* commence litigation." JRA5023:2-10 (McCarthy). McCarthy's reference to the circumstances where BNYM would "have to" commence litigation was plainly a reference to those circumstances where BNYM could be directed by investors with the requisite 25% presentment standing to force it to sue.[9] Moreover, when asked whether he had

[9] Indeed, when confronted with the language in BNYM's October 2011 brief indicating that BNYM would not sue (and that investors would be unable to obtain any recoveries for the Trusts in which the Institutional Investors did not own 25% except under the Proposed

ever "hinted" that BNYM was prepared to sue where the Institutional Investors did not own 25%, McCarthy made it crystal clear that he had no recollection of conveying that message during the negotiations, and that BNYM was in fact *not* prepared to sue on behalf of those 341 Trusts:

> A. (by Mr. McCarthy) I never hint[ed] [that BNYM was prepared to sue on the less than 25% owned Trusts]. I don't hint. Let me be clear, with respect to the broader question of whether [BNYM] would sue [BOA] generally in respect to Ms. Patrick's group [the Institutional Investors], [there's] no doubt in my mind [BOA] clearly understood that *that* was a possibility.
>
> Whether at the time we filed briefs in support of the settlement in October of 2011 we were prepared to communicate to anybody that we had decided that notwithstanding the pendency of the settlement, we, on our own, were going to volitionally step up and commence litigation on behalf of holders of less than 25 percent without ever being asked; *no that's not something I communicated to Ms. Patrick or [BOA]*.
>
> Q. And you had not communicated that to [BOA] either before June of 2011 that [BNYM] would sue for trusts where the Institutional Investors did not have 25 percent; right?
>
> A. I don't recall whether we made that specific communication to [BOA] before June of 2011. I have no recollection.

JRA5032:6-5033:25. In short, Mr. McCarthy also made it abundantly clear that he understood the differences between whether BNYM would sue on behalf of trusts where certificate holders had the 25% to force it to sue, versus where they did not.

Settlement), he agreed that "that sounds like an accurate recitation of the actual facts." JRA5024:19-26 (McCarthy).

Finally, Mayer Brown partner Jason Kravitt, at his September 2012 deposition, testified in no uncertain terms that he had *not* told BOA that BNYM was prepared to sue on behalf of all 530 Trusts. JRA2028:10-2029:10. Instead, in the course of admitting that "[BNYM] had the power to bring suit to investigate and enforce the repurchase rights for all 530 [T]rusts," he also conceded that BNYM never "told anybody we were going to sue or not going to sue." JRA2031:22-2032:16 (Kravitt). Kravitt also testified that no one at the settlement negotiations asked whether BNYM was "prepared to investigate and enforce the repurchase rights on behalf of *all* 530 [T]rusts." JRA2033:5-13. And when he was confronted with BNYM's October 2011 brief and then asked whether BNYM was prepared to sue on behalf of Trusts for which no investor group owned 25%, Kravitt, BNYM's outside counsel, confirmed that "thus far, we've not been willing to bring [a] lawsuit without an instruction and indemnity." JRA11302-04 (PTX657, 611:5-614:24).

B. BNYM's Failure to Even Threaten to Sue on Behalf of Two-Thirds of the Trusts Forced the Institutional Investors to Negotiate with One Arm Tied Behind Their Back, and the Court Below Never Considered the Impact of that Failure on Certificateholders

The record also clearly shows that BOA itself had estimated the "upper" range of its settlement exposure for private repurchase claims at $7-$10 billion, and that BOA's settlement range included a large built-in discount to reflect the

"uncertainty" of whether it would ever be sued on behalf of Trusts for which there was no investor group that held a 25% stake.

Significantly, BOA used the same discounted $7-$10 billion repurchase exposure number in both its *pre-settlement* public disclosures developed in connection with its 2010 end-of-year SEC reporting (*see*, *e.g.*, JRA6368-70 (PTX26)), and in its *post-settlement* May 5, 2011 Form 10Q filing for the first quarter 2011 ("1stQ2011 Form 10-Q"). JRA12165 (RTX350.177). As the 1Q2011 Form 10-Q explained, the $7-$10 billion exposure range had been calculated by reducing BOA's originally higher estimated exposure *by $4 billion*, based on BOA's belief that it was still "difficult to predict how a trustee may act or how many investors may be able to meet the [25%] presentation thresholds." *Id.* Nor is there any question that BNYM, and particularly Mayer Brown, understood that BOA was taking advantage of these "presentment" difficulties at the settlement negotiations. *See* Tr. 2018:15-2019:4 (Kravitt). Indeed, the "details" for the calculations of the $7-$10 billion contingency disclosure in BOA's fourth quarter 2010 public disclosures were made into handouts that were used at the February 2011 negotiation sessions (JRA6341-48 (PTX23), JRA6368-70 (PTX26)), and Mr. Kravitt testified that he also reviewed BOA's 2010 annual report and 1stQ2011 Form 10-Q. JRA2017:21-2018:14 (Kravitt). As described above, BNYM's Bailey similarly understood that BOA's negotiation positions

were being discounted based on the "presentment" obstacles that the Institutional Investors faced. Tr. 2467:17-22 (Bailey).

BNYM and the Institutional Investors nevertheless aver that BOA's discount for the trusts with "presentment" obstacles (*i.e.*, the Trusts where no investor group had the 25% stake to force the Trustee to sue) could not have affected the $8.5 billion price negotiations. For example, the Institutional Investors assert that BOA's presentment discount was "rejected by both the Trustee and its expert, Brian Lin." IIRB15. *However, neither BNYM nor Mr. Lin actually negotiated the $8.5 billion settlement price*; to the contrary, their supposed "factual" review of the merits and damages issues was performed only *after* the $8.5 billion price was negotiated by the Institutional Investors group. *See* JRA7914 *et seq.*, PTX444 (Lin report dated June 7, 2011). Indeed, although both BNYM and the Institutional Investors deny that BNYM and its counsel (Mayer Brown) were largely absent from the actual price negotiations, it is undisputed that no one from either BNYM or Mayer Brown attended the price negotiations of April 18, 2011 at which the final settlement price was agreed upon. *See* JRA1498:11-1499:4 (Kravitt). In fact, Kravitt testified that BNYM and Mayer Brown had made the strategic decision to be absent from the final price negotiations -- and that they would only later, on an *ex post facto* basis, check and approve the "tentative" number that the *Institutional Investors* had negotiated. As Mr. Kravitt testified:

> Ms. Patrick [the Institutional Investors' counsel] was allowed to negotiate a number. She knew the Trustee had not consented to that number and she knew that the Trustee had hired an expert to review whether that number was adequate. So she was negotiating a tentative number.

JRA1497:8-12 (Kravitt).

In sum, not only is it undeniable on this record that BNYM never even threatened to sue on behalf of the 341 Trusts for which there were no investors that held a 25% stake, but it is uncontested that, both before and after the settlement, BOA represented in its own SEC filings that it had consistently discounted its own exposure by several billion dollars based on the "uncertainty" that it would ever be sued on such Trusts.

In such circumstances it defies credulity to believe that BOA would not have been willing to pay materially more to settle the claims for all 530 Trusts if BNYM had not failed to even threaten to sue on behalf of the 341 Trusts as to which the Institutional Investors could not compel BNYM to act. Moreover, although BNYM has yet to offer any reason -- other than its factual evasions -- as to how it could have ever been "reasonable" or anything but an abuse of discretion for it to have failed to even threaten to sue on *all* Trusts' behalf, it is also undeniable that the Decision below did not discuss this aspect of BNYM's misconduct (other than to reference, at JRA94a, BNYM's general willingness to litigate, which, as shown above, was limited to just 189 of the 530 Trusts).

C. The Overwhelming Bulk of the Trustee's "Investigation" Took Place Only *After* the $8.5 Billion Settlement Price Had Been Negotiated, and Was Not Designed to (and Could Not Be Used to) Help Maximize the Recovery for Certificateholders

BNYM claims that it conducted a "robust factual and legal investigation." *See* BNYMRB15-24.

However, as Robert Bostrom (Freddie Mac's general counsel) testified, "[t]he meetings that I was at, the [BNYM] representatives were more observers than participators." JRA13393:20-23 (RTX4142-043). Moreover, Mayer Brown's Kravitt, in an email dated the same date as the price negotiations (April 18, 2011) -- but which he testified was in regard to an earlier meeting – referenced his desire that Mayer Brown attorneys be allowed to "sit in" on the negotiations because "we'd like to be able to say that we *'watched'* the whole thing and it was clearly hard fought arm's length." JRA11669 (RTX90); JRA1499:9-1501:6 (Kravitt). As noted above, however, no one from Mayer Brown (or BNYM) was present to even watch, let alone participate in, the critical April 18, 2011 settlement price negotiations.

BNYM similarly glosses over the fact that (leaving aside the other inadequacies with its "efforts") almost all of its purported "investigation" took place *after* the $8.5 billion settlement price had been negotiated. For example, although BNYM touts the findings of its expert Brian Lin to the effect that the $8.5 million figure fell within his "range of reasonableness" (BNYMRB21) -- and avers

that he "provided his views *without* any knowledge of the tentative $8.5 billion agreed settlement amount (*id.* at 16) -- Lin's firm (RRMS) was given the slides with the $7-$10 billion BOA range. *See, e.g.*, JRA1582:6-10 (Kravitt testifying that "RRMS advisors were furnished the materials as the parties developed them with regard to calculating the cash payment number").[10]

Moreover, RRMS's report reflects that Mr. Lin was forced to accept BOA's loan defect percentages (the "breach rate" and "success rate") because he had no "public" information on the GSE experience (JRA7922 (PTX444.110)), and was unable to verify the defect percentages that the Institutional Investors had asserted were obtained from an unidentified 250,000 loan re-underwriting review (JRA7917 (PTX444.105)). Lin's *post facto* reliance on BOA provided "GSE data" was all the more flawed because, as discussed further at §III.B.4 below, even the Institutional Investors' steering committee (including Freddie Mac's general counsel) didn't believe that a methodology based on that data was reasonable. JRA13414 (RTX4143-017). Meanwhile, not only did BNYM fail to test a sample of any loan files but, as part of its purportedly "vigorous" investigation, BNYM never even provided to the Institutional Investors' lawyers who were actually negotiating the settlement a copy of certain damning correspondence (*see*

[10] It should be noted that (1) the $8.5 billion settlement price was only 10% of the 530 Trusts' losses as calculated by BNYM's *trial* expert, Phillip Burnaman (JRA2834:25-2835:5) (Burnaman), and (2) Burnaman's total loss estimate of $85 billion was significantly greater than Lin had calculated in his June 2011 report for BNYM, in which Lin had estimated total Trust losses as being only in the range of $61.3 to $76.8 billion. JRA7922, PTX444.10.

JRA12863-68 (RTX1342)), or the information contained therein, that BNYM had received in 2009 from one of the two major "GSEs," Fannie Mae. *See* JRA2189:4-2190:3, 2437:9-2440:26 (BNYM failed to forward this letter's contents). *Inter alia*, that correspondence: (1) reported that Fannie Mae had calculated a defect rate of 49.8% for defaulted Countrywide loans in its portfolio (which was obviously far higher than the 14% defect rate that BOA proffered in the negotiations and that Lin had accepted at face value), JRA12864 (RTX1342); and (2) warned that the defect rate for loans in Countrywide's "private label" securitizations (*i.e.*, the Trusts) was likely to be even higher than 49.8%. JRA12863-64 (RTX1342) (citing "the generally higher incidence of fraud and credit-related issues related to loans underlying private label securities (as opposed to loans sold directly to Fannie Mae . . .").

The reports of the two law professors (Daines and Adler) that BNYM also touts as evidence of its "thorough" legal analysis were also commissioned only *after* the $8.5 billion price was reached. JRA11800 (RTX138-004). Moreover, when retaining Prof. Adler (and giving him a one-week deadline to reach his opinions), Kravitt specifically advised him that

> *[Your] opinion would not have to conclude as to which party was right or wrong with regard to the legal issues at hand, but merely that if the Defendants made such arguments, there was a substantial (or perhaps "reasonable") chance that they would win on such arguments*. This is because the Trustee, our client, would be deciding in its analysis of a settlement of the put back claims, whether such

> legal arguments were sufficiently serious that it would be appropriate to haircut a calculation of damages to take account of them.

JRA11799 (RTX138-003).

One of the matters on which Mr. Kravitt asked Prof. Adler to opine was the issue of "substantive consolidation," *i.e.*, whether BOA's assets would be deemed consolidated with Countrywide's in the event BOA put Countrywide into bankruptcy. *Id.* However, when Prof. Adler prepared his written opinion, rather than simply provide the conclusory opinion that Mr. Kravitt had requested, Adler also appropriately described the various fact-intensive factors that such an inquiry would entail. *See* JRA7901, JRA7906 (PTX444.89, 444.92). Yet it is undisputed that BNYM and Mayer Brown did *nothing* after (let alone before) the settlement was reached to investigate the extent to which relevant facts might actually be proved. Thus, even though Adler's report was provided to BNYM's Trust Committee – and even though the head of that Committee (Stanley) testified that the extent of the Trustee's ability to reach BOA's assets was among the most important considerations that drove BNYM's decision to approve the settlement (JRA3124:7-3125:6) – the conspicuous absence of any relevant factual analysis in Adler's opinion on "substantive consolidation" apparently explains BNYM's objection below to allowing examination of Adler on that issue on the grounds that BNYM had purportedly "not relied" on his report (meaning that BNYM had presumably excluded the report's findings from any material role in its

"investigation"). JRA4433:12-26.[11]

Similarly, as the PB describes, the expert report of Professor Daines, which BNYM did rely upon to address certain legal theories for reaching BOA's assets, ultimately concluded that the answers turned on facts that he was not provided with. *See* PB28-31.

Thus, even assuming that the Institutional Investors may have tried to argue for a higher recovery, they lacked critical "big sticks" -- notably discovery of BOA's internal business documents that could help prove the case's merits and damages, as well as those needed to determine whether they could expose BOA to successor liability and thereby recover a vastly greater sum from BOA if the Trusts' claims were taken to trial. And neither BNYM nor its counsel can point to *anything* they did that actually helped (or was even designed to help) the Institutional Investors or absent certificateholders maximize their recovery.

D. BNYM Continues to Deny Having Had the Duty to Take All Reasonable Steps to Maximize Certificateholders' Recovery, and Admits to Having Relied on Conflicted Counsel

BNYM has at least been candid with respect to certain matters. For example, despite having manifestly assumed the *power* to settle all claims at issue, it continues to deny that it had any *duty* to take all reasonable steps to protect its

[11] BNYM's Lundberg similarly testified that BNYM had not relied on Adler's "substantive consolidation" report, nor had BNYM considered whether the bankruptcy trustee would be able to reach BOA's assets in the event of a bankruptcy filing, or what facts would be important to that inquiry. JRA4625:7-12; 4625:18-23; 4626:14-17 (Lundberg).

beneficiaries in exercising that power. *See also* PB14-20. BNYM also does not deny that, when asked directly whether he viewed his job as obtaining "the maximum recovery for certificate holders," Mayer Brown's Kravitt answered: "I viewed my job to be representing [BNYM] as trustee, and I understood them to be taking into consideration the interest of the certificate holders." JRA11294:6-19 (PTX657-011). Kravitt's response also coincides with how his litigation partner, Mr. Ingber, similarly saw Mayer Brown's and BNYM's duties: not those of a full-fledged fiduciary who should have actively developed the facts and legal theories as a prudent person would have in the management of its own affairs to maximize the certificateholders' recoveries at the bargaining table, but rather as those of an entity that had only the limited and passive duty to avoid putting certificateholders' money into BNYM's own "pocket." JRA5576:2-5577:14 (Trial Tr.).[12]

BNYM also admits that the legal counsel it retained to advise it throughout the settlement process, Mayer Brown, was patently *conflicted* in terms of advancing the certificateholders' interest in maximizing their recovery, as Mayer Brown was simultaneously acting as counsel to the Trust's main adversary, BOA, in other matters. BNYMRB46. BNYM's inexplicable "justification" of its decision to retain and rely on such conflicted counsel to resolve claims arising out

[12] Similarly, BNYM's Bailey testified that it was simply not BNYM's job to investigate or enforce the Trusts' repurchase rights. JRA2423:11-2426:25 (Bailey); *see also* JRA2493:18-2494:2 (Bailey) (testifying that the seller's repurchase obligations were "in some ways a *self-enforcing* obligation").

of investor losses in the range of $100 *billion* – namely, that BNYM was simply free to unilaterally decide on behalf of all absent certificate holders that such retention was proper without their knowledge or consent (and to conceal the existence of the conflict until forced to reveal it in discovery in this action) – is discussed at §III.B.2 below.

With the foregoing facts in mind, we return to the relevant legal issues.

III. ARGUMENT

A. BNYM's Threshold Contention That the Settlement's Substantive Fairness Is Irrelevant Is Nonsense

Preliminarily, BNYM asserts that this Court has no business even inquiring into whether the Proposed Settlement's terms are substantively "fair, reasonable, and adequate," and argues that the "only" question is "whether BNYM's conduct in settling the claims was reasonable and in good faith." BNYMRB36.

BNYM apparently believes that certificateholders, by delegating to the Trustee the authority to sue on claims on certificateholders' behalf, necessarily (1) granted BNYM authority to settle such claims on whatever terms BNYM cared to accept (as long as BNYM did not profit from the deal, *see* PB49), and (2) agreed that BNYM could obtain deferential judicial approval of -- and judicial immunity for -- its actions regardless of whether the deal was actually fair or reasonable. BNYMRB35 (citing *Quadrant Structured Products Co., Ltd. v. Vertin*, 23 N.Y. 3d 549 (N.Y. June 2014)). As the Objectors previously showed, however, under U.S.

due process principles the ability of a party -- including a trustee -- to obtain court-ordered releases binding on absent non-parties is invariably limited to circumstances where the party, in addition to assuming fiduciary powers to act on others' behalf, also assumed fiduciary responsibilities in exercising such powers. PB39-46; *Taylor v. Sturgell*, 553 U.S. 880, 894-95 (2008) (non-parties may be bound "in certain limited circumstances" where they were "adequately represented by someone with the same interests," notably in "properly conducted" class actions and suits brought by "trustees, guardians, and other fiduciaries"); *see also In re Johns-Manville Corp.*, 600 F.3d 135, 154 (2d. Cir. 2010) (where a proposed settlement seeks to release "in personam" claims, the better due process analogy in terms of notice and representation principles is to class action settlements, not "in rem" proceedings").

Indeed, even under the "business judgment rule" -- where courts give substantial deference to business decisions that affect investors' rights – deference is only given to decisions of unconflicted corporate officers and directors who have undisputed fiduciary obligations to act in their company's best interests. Here, by contrast, a Trustee that consistently denied having ever assumed fiduciary obligations,[13] and that was represented by a conflicted law firm that was

[13] Indeed, BNYM actually took steps to *avoid* having to give notice of defaults to absent certificateholders in order to try to avoid the "complications" of becoming a fiduciary. *See* PB19-20.

simultaneously representing the Trust beneficiaries' prime adversary, BOA, without the absent beneficiaries' knowledge or consent, is *not* entitled to have the substance of its Proposed Settlement viewed with deference, let alone (as BNYM asserts) ignored.

B. BNYM's Settlement Conduct Was, in Any Event, Fundamentally Flawed and Objectively Unreasonable

In all events, and regardless of the extent to which this Court chooses to parse the dividing lines between substantive and procedural reasonableness, BNYM's conduct does not merit Article 77 relief.

As BNYM acknowledges, "[w]here a trustee has discretionary power, its exercise should not be the subject of judicial interference, as long as it is exercised reasonably and in good faith." BNYMRB36 (quoting *Haynes v. Haynes*, 72 A.D. 3d 535, 536 (N.Y. App. Div. 2010) *id.* at 38 ("[i]f it is reasonably prudent to compromise [trust] claims … the trustee can properly do so") (quoting RESTATEMENT (Second) of Trusts §192 cmt. a) (1959); *Matter of Clark*, 280 N.Y. 155, 163 (N.Y. 1939) (considering whether trustee "administered the trust in a careless or negligent manner"). Similarly, although BNYM avers it had no duty to take any action to enforce the Trusts' rights prior to issuance of a formal notice of an event of default (which the Public Funds dispute[14]), BNYM concedes that

[14] Objectors have brought a pending putative class action in federal court seeking to hold BNYM liable for, *inter alia*, having turned a blind eye to overwhelming evidence of

"[t]hat does not prevent the Trustee from *choosing* [to enforce or settle those rights], *as long as* it acts reasonably and in good faith. This standard comes from the common law of trusts *and is not modified by the PSAs*." BNYMRB36, n.5.

"Reasonableness" in the context of settling trust claims prior to instituting litigation must necessarily be assessed in the context of the over-riding purpose for allowing the Trustee to sue or settle in the first place: namely, the purpose of *maximizing* the Trusts' and the underlying certificateholders' recovery. Accordingly, while noting that the PSAs conveyed "all right, title and interest" in the mortgage loans to the Trustee, the Decision below correctly observed that such language does not give the Trustee freedom to dispose of such interests as its own inclination or convenience might suit, but instead implicates the higher obligation to act "for the benefit of the Certificateholders" for the purpose of "protect[ing] and maximiz[ing] the value of the interest thereby granted." JRA89a-90a (POFJ22, 23); *see also eBay v. Merc Exchange*, 547 U.S. 380, 395 (2006) ("discretion is not whim," and must be exercised in accordance with the applicable legal standards). As discussed above and summarized below, BNYM failed to discharge this critical responsibility, regardless of whether the applicable standard

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circumstances constituting events of default relating to the Trusts since as early as late 2007 or 2008. *See Retirement Board of the Policemen's Annuity Benefit and Ret. Fund of the City of Chicago. v. Bank of New York Mellon*, No. 1:11-cv-05459 (S.D.N.Y.); *see also* PB14, n.7.

of care is couched as "ordinary" reasonableness or that of a full-fledged fiduciary (who is obligated to act as a prudent person would in managing his own affairs).

1. BNYM's Failure to Retain Any Counsel to Represent the Certificateholders' Interests

First, BNYM utterly fails to offer any good cause for its failure to retain any counsel to represent the absent certificateholders' interests. It is simply undisputed -- and indisputable -- that (1) BNYM denies having ever assumed full-fledged fiduciary duties to zealously represent the certificateholders' interests, and (2) that Mayer Brown, whose counsel BNYM purportedly relied on throughout, was retained to represent only BNYM. Indeed, Mayer Brown's senior attorney (Kravitt) has expressly and consistently denied throughout that he, or anyone else for that matter, represented the absent certificateholders' interests (as opposed to just BNYM's interests) during the negotiations. PB16-18; *see also* §II.D above.

Even if there are scenarios where the amounts in controversy are so small, or the law and facts so straightforward, that Trustees could reasonably undertake to settle claims without retaining counsel with the customary duties to zealously represent the Trust beneficiaries' interests, this case represents the antithesis of such a scenario. Indeed, the amounts in controversy were staggering, involving losses potentially exceeding $100 billion, and the claims involved both legally and factually complex issues. In such circumstances, a Trustee's decision to settle

without retaining counsel to actually represent the interests of absent certificateholders was unreasonable, if not negligent per se.

2. The Trustee's and Mayer Brown's Conflicts of Interest

Moreover, while failing to retain anyone to represent absent certificateholders, BNYM relied throughout on its counsel, Mayer Brown, which had undisputed conflicts of interest given its simultaneous representation of the Trusts' main adversary, BofA, in other matters.

BNYM may have found it "convenient" for its own purposes to retain Mayer Brown, but BNYM cites no authority for the proposition that it is ever reasonable for Trustees (absent their beneficiaries' informed consent) to rely on conflicted counsel in connection with the exercise of any powers to settle Trust claims. Where a Trustee acts to protect the investments of certificateholders, its counsel's loyalties run to the certificateholders themselves. *See, e.g.*, *Matter of People*, 303 N.Y. 423, 430 (N.Y. 1952). To be sure, a Trustee is free to waive whatever conflicts it wishes in the context of retaining counsel to represent solely *its* own interests, but that freedom is hardly relevant to its inability to waive conflicts in the context of its negotiating the release of the economic rights and claims of certificateholders against a third-party adversary to whom that counsel also owes its loyalties.

While one might imagine extraordinary circumstances where it might be reasonable for a Trustee to hire the law firm *of the Trust's main adversary* to handle claims against that adversary (whether in negotiations or litigation) – such as circumstances where it is not reasonably possible to obtain timely consent of the beneficiaries, or where the litigation is sufficiently small and parochial (*i.e.*, a small dispute in a two-law firm county where finding conflict-free local counsel would be difficult). But similar to the argument in the immediately preceding section, this case is light-years from one where BNYM should be excused for hiring *conflicted* counsel, especially where BNYM attempts to use its reliance on such counsel in Article 77 proceedings to obtain a judicial finding that its conduct was "reasonable." Instead, in circumstances where there were plainly dozens of other highly competent and unconflicted law firms in New York City alone which could have vigorously represented the interests of absent certificateholders, the Article 77 Court's failure to find that BNYM's retention of counsel was unreasonable was error.

BNYM responds by stating (without citation) that "all relevant parties" provided conflict waivers. But this response simply demonstrates that, to this day, BNYM fails to recognize that the "relevant" parties include the absent beneficiaries whose economic interests are at stake. BNYMRB46. But BNYM does not deny that it did not bother to disclose its counsels' conflicts to

certificateholders, much less seek their "waivers" or a Court's permission to proceed without them, or that Mayer Brown's conflicts only came to Objectors' attention through discovery in this action. PB23. And because neither BNYM nor the Institutional Investors purported to assume fiduciary responsibilities of representing absent certificateholders, they could not consent for them.

This is not, as BNYM suggests, a matter of semantics or legal "niceties" (BNYMRB41): had Mayer Brown understood that its client was the certificateholders, it would have recognized that it owed its loyalties *to them* and could not jointly represent *them* and BOA without full disclosure and the unqualified consents of both BOA and the certificateholders. *See, e.g., Matter of Kelly,* 23 N.Y.2d 368, 376 (1968) (even where conflicted representation is potentially permissible, disclosure and informed consent of all affected parties is required); *see also* PB47-51; *cf.* BNYMRB46 ("all *relevant* parties provided Mayer Brown *written conflict waivers*").[15]

Alternatively, BNYM relies on its authority under the PSAs to "consult with counsel … of its selection." BNYMRB47. But Mayer Brown did not merely provide BNYM with "advice;" it monitored the settlement negotiations on its behalf and directed what little post-settlement investigation of the facts and law

[15] BNYM attempts to distinguish *Kelly* on the ground that in involves a law firm that represented both claimants and adverse insurers. But nothing in *Kelly* remotely suggests that the strict principles applicable to law firm conflicts were intended to be limited to the facts of that particular case.

that did occur. Moreover, one cannot reasonably read the cited provision in the PSAs as allowing a Trustee to rely on *conflicted* counsel, any more than one could read it as authorizing retention of counsel with no relevant experience – especially since the "default" rule in New York (and across the country) is that conflicted representation is presumptively improper absent clear waiver by the parties in interest. *See Matter of People,* 303 N.Y. at 430 (citing "centuries-old" maxim that "no man can serve two masters"); *Cinema 5, Ltd. v. Cinerama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976) (same).

Finally, BNYM argues that the Court can simply ignore all issues relating to BNYM's failure to assure that anyone was committed to zealously representing the absent shareholders – and all issues relating to BNYM's own reliance on conflicted counsel – because there is "no evidence" that Mayer Brown's conflicts actually biased Mayer Brown's or BNYM's decisions during the negotiations. BNYMRB46. However, where those who assume fiduciary powers have conflicting loyalties (or have relied on those with conflicting loyalties), it is simply no answer that the conflict purportedly did not harm its beneficiaries. PB51, citing *Wendt v. Fischer*, 243 N.Y. 439, 443-44 (N.Y. 1926) (Cardozo, J.); *Avena v. Ford Motor Co.*, 89 A.D. 2d 149, 155 (1st Dept. 1982) (citing *Wendt*).

Moreover, even assuming *arguendo* that "causation" were somehow an element of the conflicts analysis here -- which it is not (*see*, *e.g.*, *Wendt*) -- the

burden of proof is squarely on *BNYM* as Trustee to show that the beneficiaries' interests would not have been better served had unconflicted and truly zealous counsel been appointed. *See, e.g.* JRA5180:7-8 (Trial Tr.) (statement by Justice Kapnick to BNYM that "you do have the burden of proof); *see also* Bogert's Trusts & Trustees, §560. And as shown below, the evidence (including the facts discussed in the next section that the Article 77 Court's Decision did not even discuss) is compelling that BNYM's (mis)conduct and omissions likely caused the Proposed Settlement to be several *billion* dollars less than the $8.5 billion sum that BNYM accepted.

3. BNYM Has No Response – Other Than Its Disingenuous Attempt to Distort the Facts -- to Objectors' Argument That It Was Unreasonable for BNYM to Fail to Even *Threaten* to Sue on Behalf of the 341 Trusts Where the 25% Presentment Level Was Not Met

As the Public Funds pointed out in their opening brief, (1) neither BNYM nor its counsel ever so much as *threatened* to sue BOA on the 341 Trusts as to which there was no investor group that held a 25% stake, even though (2) BOA had applied a "presentment discount" of roughly 20% in preparing its own settlement ranges (and had even disclosed in SEC filings that it had discounted its expectations of its total private label MBS repurchase liabilities by *$4 billion*) because of the lack of any trustee commitment to enforce repurchase rights for those trusts that did not meet the 25% presentment level. PB23-26, 54-55.

Rather than candidly admit these damning facts, in its Reply BNYM asserts that the Objectors' "allegations" that BNYM "fail[ed] to even threaten to sue on behalf of the Trusts" is "spurious" and unsupported by "a shred of evidence." BNYMRB45. It is BNYM, however, that -- to put it mildly -- is grossly distorting the record. Simply stated, and as detailed at §II.A above, the record could hardly be clearer that neither BNYM nor its counsel *ever* threatened to sue (or "implied" that it would sue) on behalf of any of the 341 Trusts, which constituted roughly two-thirds of the Trusts at issue. *Indeed, in trying to win judicial approval of the Proposed Settlement and dissuade investors from filing objections, both BNYM and the Institutional Investors went out of their way to argue that there were "no alternatives" to the Proposed Settlement for investors in the 341 Trusts absent the presence of any investor group with the requisite 25% holdings who could compel the Trustee to actually enforce those Trusts' rights. See* §II.A above.[16]

In such circumstances, BNYM's failure to even *threaten* to sue on behalf of the 341 Trusts is inexplicable, nor does BNYM's brief even attempt to offer any good cause for BNYM's failure to do so.

[16] Accordingly, although BNYM represents to this Court that the evidence is "clear" that BNYM "could and would sue if a settlement was not reached", BNYMRB45, BNYM is well aware that its statement is a half-truth at best, if not an improper attempt to mislead the Court. Although BNYM's tactics may have been successful with the Court below -- which did not even address BNYM's failure to threaten to sue *on behalf of the 341 Trusts* in its Decision -- this Court should obviously not make the same mistake.

Nor is BNYM's alternative suggestion that BNYM's failure to do so had no impact on the ultimate $8.5 billion settlement remotely persuasive. The *only* credible evidence in the record shows that not only did BOA make clear that it was discounting its settlement position by roughly 20% based on BNYM's unwillingness to sue, *but BOA made its position clear in sworn filings with the United States Securities and Exchange Commission. See* §II.B above, discussing JRA6368-70 (PTX 26) and JRA12165 (RTX350.177). And although it may not be possible to state with *certainty* just how much more the Institutional Investors would have been able to negotiate from BOA if it had had the power to credibly threaten BOA with Trustee-led litigation in the event that no settlement could be reached, it is only BNYM's own unreasonable failure that creates any doubt as to the *extent* to which it harmed the certificateholders' interests in maximizing their recovery. What the available evidence clearly shows, however, is that there is good reason to believe (and no credible reason to doubt) that the $8.5 billion recovery would have been significantly greater had BNYM merely *threatened* to sue on behalf of the 341 Trusts, and that the recovery would have likely been at least 20% (or roughly $1.7 *billion*) larger.[17] In any event, at least one thing is

[17] If one discounts a settlement number by 20%, one actually needs to increase the resulting discounted number by *25%* (not 20%) to get back to the original number. *E.g.*, a $10 exposure discounted by 20% equals $8, but one must increase $8 by 25% (or $2) to get back to $10.

certain – BNYM's failure to even threaten to sue on behalf of two-thirds of the Trusts at issue here was unreasonable and inexcusable.

4. BNYM's Reliance on *Post-Hoc* Rationalizations Is No Substitute for Its Failures to Investigate and Vigorously Negotiate Before the Proposed Settlement's Terms Were Agreed

As detailed in §II.C above, it is undisputed that the vast bulk of what BNYM points to as evidence of its "thorough" legal and factual investigation was only conducted after the $8.5 billion settlement price was reached, and thus was plainly incapable of actually affecting the terms of the settlement. Moreover, much of BNYM's touted expert reports simply emphasized the importance of being able to review and analyze key underlying facts, such as the facts that would have been relevant to reasonably assess the likelihood that BOA could have been held liable for Countrywide's liabilities (and that MBIA apparently was able to use to help leverage a staggering ten figure settlement of its claims on just a *handful* of Countrywide Trusts). *Id.* Unfortunately, as previously noted, BNYM failed to even try to obtain or investigate such facts, either before or after the negotiations.

Moreover, although BNYM argues that its expert, Brian Lin, came up with an "independent" but similar range of $8.8-$11 billion in potential recoveries "without knowing" the agreed $8.5 billion settlement number, Lin's firm (RRMS) was given the February 2011 handouts setting forth BOA's $7-$10 billion range. *See, e.g.*, JRA1582:6-10 (Kravitt) ("RRMS advisors were furnished the materials

as the parties developed them with regard to calculating the cash payment number."). In addition, RRMS's report reflects that Mr. Lin simply accepted BOA's loan defect percentages (the "breach rate" and "success rate") because he had no "public" information on the GSE experience (JRA7922 (PTX444.110)), and was unable to verify the defect percentages which the Institutional Investors had asserted were obtained from an unidentified 250,000 loan re-underwriting review (JRA7917 (PTX444.105)). Moreover, Lin's highest range of estimated total Trust losses (which he then discounted to calculate to calculate his "reasonable" settlement range figures) was significantly lower than the $85 billion loss figure calculated by Phillip Burnaman, who BNYM proffered as another of its experts during the Article 77 hearing. *See* fn. 10 above.

It was as a result of BNYM's failure to obtain additional information during negotiations that BNYM's *post-facto* expert Lin accepted BOA's the 14% defect rate at face value. However, as Lin himself admitted in his report, one of the "cons" of his analysis was that he "lack[ed] historical data to confirm BofA's 'Defect Rates'" – and he added that "it would have been easier to compare two analogous portfolios" (rather than use GSE repurchase data to draw conclusions concerning the Trusts, which were all "private-label"). JRA7918, PTX444.106.

Indeed, in addition to being sharply lower than the 30% (and higher) rates advanced by the Institutional Investors (JRA7917, PTX444.105), the 14% defect

rate that BOA had purportedly "extrapolated" from the GSE's actual repurchase experience with BOA was also sharply at odds with the 49.8% defect rate for defaulted loans that Fannie Mae had provided to BNYM by letter in January 2009. *See* JRA12863-68 (R-1342). That letter (and the much higher defect rate referenced therein) was copied to multiple BNYM officers, including the BNYM in-house lawyer (Bailey) who was Mayer Brown's principal contact within BNYM's legal department. *See* JRA2189:4-2190:3 (Bailey). Inexplicably, however, neither this Fannie Mae letter nor its substance were provided to the Institutional Investor lawyers who were negotiating the settlement agreement, or to Mayer Brown or BNYM's Trust Committee, to challenge BOA's 14% GSE defect rate. JRA2437:9-2440:26 (Bailey).

Moreover, at least two representatives of the Institutional Investors – including Freddie Mac's former general counsel, Robert Bostrom – testified that the methodology BOA used to extrapolate its 14% defect rate for the Trusts from the GSEs' repurchase experience was highly flawed, unreliable, and misleading. JRA13368-69, 13395-97 (RTX4142-018-019, 045-047) (Bostrom Dep.) ("[t]he investor group clearly rejected [the GSE-based data] as being not relevant, *just so totally out of line as to not even be worthy of discussion*") JRA13396:13-16; JRA13414 (RTX4143-017) (Robertson Dep.) (the "steering committee never accepted those numbers . . . because we didn't believe that their approach was

correct") JRA13414:15-22. As Bostrum explained, the GSEs'repurchase decisions did not necessarily reflect the true defect rate even for GSE-purchased loans: for example, other considerations influenced the GSE's repurchase decisions, such as the interest that the big GSEs (*e.g.*, Freddie Mac) had in preserving their business relations with big loan sellers. JRA13414 (RTX4143-017). Another Institutional Investor representative, Mr. Robertson, testified that another problem with using the GSE repurchase experience as a proxy for the defect rate in the Trusts was that the GSEs largely stopped auditing their mortgage loans for breaches of their representations and warranties two years after the loans were originated. JRA13418 (R4143-021) (Robertson Dep.)[18]

Thus, BNYM's argument that it acted conducted a "vigorous" or "thorough" investigation in the best interests of certificateholders rings hollow. But no one at BNYM or Mayer Brown had any interest in seriously developing the key facts or critical legal analysis, particularly those that would develop the strengths (rather than the weaknesses) of the merits, or focus on the recoverability of significantly larger amounts of damages even if, as it purportedly threatened, BOA had put Countrywide into bankruptcy. But BOA knew it was never going to be faced with

[18] Similarly, in September 2011 (shortly after the settlement was submitted to the Article 77 Court for review), the Inspector General of the Federal Housing Finance Agency ("FHFA") found that Freddie Mac's process for selecting defaulted mortgage loans for review was so flawed that 300,000 loans originated between 2004 to 2007, with an unpaid principal balance of $50 *billion*, had not even been considered for possible repurchase claims. JRA11926 (RTX201-020).

even an "Irving Picard"-type trustee that would ever be willing to doggedly seek the facts or otherwise seek to maximize the beneficiaries' recoveries. Instead, BOA clearly understood that in this matter it ultimately had to confront only a feckless and conflicted BNYM as the trustee.

5. At Bottom, the Settlement "Process" Had More Indicia of Being an Elaborate Kabuki Dance Than a Process that Was Reasonably Calculated to Maximize the Trusts' Recovery

In a classic Freudian slip, Kent Smith (one of the Institutional Investors called to explain what had occurred during the price negotiations) described the negotiations as a "kabuki." JRA398:22-26; 602:20-22 (Smith). When he was confronted on cross with the definition of a "kabuki dance" as "an event that is disguised to create the appearance of a conflict when in fact the actors work together to determine the outcome beforehand," Smith back-tracked only slightly, explaining that he had meant to say that the negotiations were "an elaborate production about who was going to be able to split which difference finer" where "posturing [was] going on." JRA602:20-603:9; 604:24-605:5 (Smith).

In this context, even accepting the Institutional Investors' description of negotiations as "often hostile, with the parties becoming 'very loud or very agitated'" (IIRB16), and that an agreement was reached only after the Institutional Investors gave BOA an '"$8.5 billion take it or leave it, fill or kill' demand" (*id.* at 16-17), the one truly undeniable fact is that the final $8.5 billion figure is the *exact*

midpoint of the $7 -$10 billion contingency loss disclosure that BOA included in both its pre-settlement and post-settlement SEC reports. *See* §II.B above. Thus, while the negotiations did "split" the difference, it was a split of the difference in BOA's *own* range of its exposure for its private label repurchase liabilities. And as detailed above, *that* range had itself been heavily discounted by several billion dollars to reflect the "presentment" barriers to suit that applied to 341 of the 530 Trusts at issue here – a discount that BNYM could (and should) have easily eliminated, or at least substantially reduced, had it manifested any willingness to sue on behalf of *all* of the Trusts if negotiations broke down.

Moreover, taking a broader view, the inference is compelling that BNYM's failure to even threaten to sue on behalf of the 341 Trusts was simply part of an overall pattern of indefensibly passive behavior by BNYM throughout the settlement process, in which it also took no steps to pursue key facts to strengthen the Trusts' position at the bargaining table. Instead, BNYM relied on conflicted counsel that (like BNYM itself) abjured, in both word and deed, any obligation to maximize the Trusts' recoveries by vigorously advocating on their behalf (as opposed to trying to ensure that BNYM merely refrained from taking action that would profit BNYM at its absent beneficiaries' expense). Such conduct was not reasonable, did not reflect a thorough or good faith investigative efforts, and fatally undermines any basis for finding that the Proposed Settlement was "in the best

interests" of the Trusts. *Cf.* JRA71a-72a, JRA80a, JRA120a, (approving in part paragraphs (h), (i), (j), (k) and (t) of the PFOJ).

C. The Declining Number of Objectors in No Way Implies that the Settlement Is Fair or "Market-Tested"

BNYM argues that the fact that the 22 large Institutional Investors support the settlement, and that only a handful of objectors with "infinitesimally small" holdings remain, implies that certificateholders as a whole approve the deal, and that the settlement should be allowed to go forward as a matter of public policy.

Where, however, the Institutional Investors negotiated with one hand tied behind their back due to BNYM's refusal to even threaten to sue on behalf of two-thirds of the Trusts at issue, their willingness to settle at $8.5 billion says only that they understood that receiving that amount was better than "no remedy at all." JRA11735 (RTX132 at 6). Or as BNYM put it in its October 2011 brief in connection with its own efforts to help coerce all absent certificateholders (and the Article 77 Court) into similarly accepting the deal without filing objections, beneficiaries: "[f]or the many investors whose holdings are too small to instruct the Trustee, or who are unwilling or unable to risk tens of millions of dollars in legal fees in uncertain litigation, the benefits of which (if any) would be shared with other investors, *the alternative is the status quo*." JRA11721 (RTX131-038). The unfortunate position that all certificateholders were placed in was, however, a Hobson's choice of the *Trustee's* own making, and the fact that BNYM had

successfully coerced objectors' silence can hardly be taken as a harbinger of its good faith reasonableness, or that the settlement amount was "fair," "adequate" or "market-tested."

Nor did the "market" view the $8.5 billion settlement as the bonanza portrayed by the settlement proponents' papers, but rather as a better-than-nothing recovery that was (1) negotiated by a group of Institutional Investors whose negotiating position was hamstrung (and which included at least some very large investors that also had a vested interest in assuring BOA's continued financial health), and (2) approved by a Trustee, BNYM, that also had its own reasons for not pushing to maximize its absent beneficiaries' recovery. Instead, as stated in a June 2011 article published in the leading trade publication *American Banker:*

> The pact would provide a way for [BOA] to close out most of its private-label exposure it inherited from Countrywide, *help [BNYM] avoid an increasingly complicated legal morass*, and repay investors with at least a small portion of their losses in mortgage-backed securities.
>
> It also helps drive a deeper wedge between activist mortgage investors and *a larger group widely viewed as reluctant to push for an all-out fight with major banks*.
>
> The deal relies on an unusual role for [BNYM], the trustee for 530 Countrywide mortgage-backed securities trusts with an original face value of more than $424 billion. As a trustee, [BNYM] has generally held that it would not take action without either a direct default or a concerted investor action that would protect it from either liability or costs. But in the case of the BofA settlement, [BNYM] has accepted an indemnification from BofA itself and will push to force all of the trusts it oversees to enter into the deal. . .

> Since only a minority of investors have even tried to pursue BofA over loses on the securities, many are likely to view the $8.5 billion payment as a good deal even if it amounts to only pennies on the dollar of total losses. Likewise, the settlement is a victory for the 22 major investors that signed on with Gibbs & Bruns – participants like BlackRock Inc. and the Federal Reserve Bank of New York wanted to recoup part of their losses *but were unlikely to demand a resolution that would involve great harm to the nation's largest bank.*

JRA13336-37 (RTX4134) ("[BOA's] $8.5 Billion Settlement Divides and Conquers Activist Investors," *American Banker*, 6/29/2011).

Moreover, other former objectors who had suffered particularly large losses, such as the Federal Home Loan Bank of Pittsburgh, Triaxx, and AIG (who were all original members of the objectors' "steering committee") only withdrew towards the end of the Article 77 hearing or after they had filed appeals. Although they provided no in-court explanation for their withdrawal, a recent AIG press release indicates that such withdrawals were not a reflection of any weakness in the merits of their objections, but were due to BOA's willingness to pay off their individual claims at a premium in exchange for dropping their objections. *See* American International Group, Inc., (SEC Form 8-K), filed with the SEC on July 16, 2014 (available at www.sec.gov). Thus, to say that the remaining Objectors' arguments have been weighed and rejected by "most" investors, or to imply that Objectors are forcing their "idiosyncratic will" on some "silent majority" that favors the proposed deal, is unlikely, or, at best, pure speculation.

D. Even if This Court Approves the Settlement's Terms and Releases the Trusts' Claims Against BOA, the Court Should Refuse to Make Judicial Findings or Issue Judicial Orders Approving BNYM's Conduct or Otherwise Immunizing It from Liability

The Institutional Investors argue that a decision by this Court that declines to put its judicial imprimatur on BNYM's settlement conduct or that otherwise approves this flawed deal "in all respects" will send a message that will reverberate throughout the industry -- and well it should.

Although Trustees have the "power" to enforce and settle mortgage loan repurchase rights, they also have the obligation to do so "prudently," which at a minimum requires that, *inter alia*, they do not (1) hire their adversary's lawyers to simply "watch" the negotiations or (2) fail (in accord with the advice of such conflicted lawyers) to conduct remotely fact-finding investigative efforts (whether through formal or informal discovery) that are actually designed to help maximize the Trusts' recoveries through development of relevant facts (rather than to provide only *post hoc* rationalizations) -- and that (3) they at least *threaten* to litigate on behalf of *all* (rather than just a minority) of the Trusts whose claims they may ultimately seek to settle so that they can similarly maximize (rather than effectively throw away) negotiation leverage that any reasonable person would deem reasonably necessary and appropriate to use in order to actually maximize their beneficiaries' recoveries. *Where Trustees do less, they should not expect this*

Court to absolve them of their sins and protect them with Court orders, particularly as against those whose interests have gone unrepresented both at the negotiating table and in the proceedings below.

Accordingly, even if this Court were to approve the settlement amount without regard to BNYM's unreasonable conduct (or approve it due to the fear that BNYM's past misconduct and refusal to commit to sue on behalf of all Trusts would result in no recovery for at least 341 of the Trusts at issue), or because certain large investors support the deal, this Court should *not* make factual findings or issue judicial orders at odds with the record below. If nothing else, the Trustee here has not shown that it is entitled to a "free pass" to dodge collateral litigation that has been or might be brought by certificateholders who have not been joined as parties in these proceedings, particularly where, as here, the record shows there is good cause for such litigation to be pursued.

E. The Public Funds Do Not Dispute that BNYM Has the Power to Settle Trust Repurchase Claims; Rather, It Is that BNYM Acts at Its Peril if It Does So Unreasonably

As the Article 77 Court correctly held, the PSAs clearly conveyed to BNYM the power to enforce the mortgage loan repurchase rights on behalf of certificateholders. With that came both the *authority* to settle and the *obligation* to do so reasonably and in good faith. The latter obligations are, however, subject to

later challenge by certificateholders without regard to the "no action" clauses in the PSAs. *Cruden v. Bank of New York*, 957 F.2d 961, 968 (2d Cir. 1992).

Typically, a court plays no role in approving settlements. However, where "parties are unwilling to drop litigation" -- or, as here, to resolve their repurchase disputes and related potential litigation -- "unless a court invokes its equitable powers," the reviewing court must evaluate the "fairness" of the settlement before earning the court's "judicial stamp of approval." *In re Masters Mates & Pilots Pension Plan and IRAP Litig.*, 957 F.2d 1020, 1025-26 (2d Cir. 1992); *Avena v. Ford Motor Co.*, 85 A.D.2d 149, 153 (N.Y. App. Div. 1982) ("[B]y the very act of asking for court approval, which would otherwise not be necessary, the parties recognize that such settlements are subject to greater control and thus more difficult than the settlement of a purely individual lawsuit.").

Thus, the issue here is not whether BNYM has the authority to settle and release the repurchase rights under the PSA contracts, but rather, whether it has shown that it has earned this Court's and the Article 77 Court's judicial stamp of approval and judicial protection as against certificateholders who were not joined as parties. For all the reasons described above and in the Public Funds' opening papers, BNYM has not.

F. The Article 77 Court Applied Incorrect Legal Standards

Finally, BNYM takes issue with Objectors' alternative arguments that the Decision below applied an incorrect burden of proof and omitted sufficiently detailed findings and analysis to permit informed appellate review. However, notwithstanding that the Decision below ran to 53 pages, the first 13 simply recite the verbatim text of BNYM's PFOJ, and the next 12 recite factual background (mostly from BNYM's petition) and legal standards. And as for the remaining 28 pages, BNYM cannot deny that 27 are devoted to simply summarizing each side's position on certain issues, and that it is effectively only on the single, last page of the Decision that the Court made the key "findings" that Objectors object to here.

Objectors stand by their earlier arguments (PB55-58) that the Article 77 Court below applied a *de facto* standard of effectively finding that BNYM acted reasonably with respect to particular matters as long as BNYM could produce *any* evidence, no matter how scant, to support its position. Moreover, for the reasons further detailed at §§III above and their opening brief, Objectors further reiterate their arguments above and in their opening brief that the Article 77 Court below simply *ignored* or misconstrued key facts and legal arguments with respect to each aspect of the settlement and BNYM's conduct that it purported to "approve."

Objectors have also presented the Court with more than adequate legal and factual grounds for it to affirm the Judgment below with respect to the loan

modification claims while reversing it in all other respects, and this Court should therefore not judicially approve BNYM's conduct or the Proposed Settlement. However, to the extent that this Court determines, whether as a matter of law or of discretion, that it would be more appropriate to remand to the lower court for the purposes of making clearer factual or legal findings -- including with respect to discrete issues -- Objectors request such relief in the alternative.[19]

IV. CONCLUSION

The Judgment below should be reversed to the extent it failed to reject the proposed Settlement in its entirety, or reversed and remanded for further review under the appropriate legal standards.

DATED: September 22, 2014
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[19] BNYM objects to any remand because it would necessarily be "nothing short of a request for a complete do-over" given that the Justice who presided over the proceedings below is no longer available. BNYMRB54. However, where this Court is persuaded that the Decision gave inadequate (or no) analysis to particular issues, Objectors have the *right* to have the Decision reversed or remanded on such matters.

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